

No. 15689

United States
COURT OF APPEALS
for the Ninth Circuit

HELEN A. DAVENPORT,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 7-25-58-40

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BRIEF FOR APPELLEE

*On Appeal from the Judgment of the United States
District Court for the District of Oregon.*

STATEMENT OF JURISDICTION

Appellant was indicted together with eight other persons, namely, Edgar Robert Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, Richard C. Williams and Howard Martin, for conspiracy (18 USC § 371) to commit the crimes of mail fraud (18 USC § 1341) and fraud in the sale of securities (15 USC § 77q(a)). The indictment contained, additionally, seven counts charging mail fraud and five counts charging fraud in the sale of securities against

only seven of the above named defendants, Richard C. Williams and the appellant, Helen A. Davenport, not being included in these twelve counts. Count I (mail fraud) set forth a description of the alleged scheme to defraud, which description was then incorporated by reference in all remaining counts.

Prior to the commencement of trial, defendant Errion pleaded guilty to Counts II (mail fraud) and IX (fraud in the sale of securities) and defendant Montgomery pleaded guilty to Count XIII (conspiracy). Count IV of the indictment was dismissed at the conclusion of the trial. The indictment was dismissed as to defendant Williams during the course of the trial due to his serious illness. Defendant Martin was acquitted of all counts. The remaining defendants were found guilty by the jury on all counts on which they were charged.

Terms of imprisonment were imposed upon the defendants named in this indictment: Munkers 7 years, Errion 6 years, Lock 3 years, Bones 18 months, Wright 15 months, Montgomery 15 months and appellant Davenport one year.

The court has jurisdiction of the instant case under the provisions of 28 USC § 1291.

STATUTES INVOLVED

18 USC § 1341, generally referred to as the Mail Fraud Statute, provides, so far as applicable:

“Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent

pretenses, representations, or promises, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing . . .”

Section 17(a) of the Securities Act of 1933 (15 USC § 77q(a)) provides:

“It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

“(1) to employ any device, scheme, or artifice to defraud or

“(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

“(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.”

18 USC § 371, generally referred to as the Conspiracy Statute, provides:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy,

each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both."

COUNTER STATEMENT OF THE CASE

Count XIII of the indictment in this case, which was the sole charge against appellant, followed the usual form for such charges:

COUNT XIII.

Conspiracy

18 U.S.C. 371

Prior to March 1, 1954, the exact date being to the grand jurors unknown, and continuing to the date of this indictment, the defendants, Edgar Robert Errion, also known as Bob Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, Howard Martin, Richard C. Williams, and Helen A. Davenport, in the State and District of Oregon and within the jurisdiction of this court, and at divers other places, did conspire, combine, confederate, and agree with each other to commit the following crimes and offenses against the United States:

Violations of Section 1341, Title 18 U.S.C., by using, and intending to use, the mails of the United States for the purpose of executing the scheme and artifice to defraud and to obtain money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative, as described in the first count of this indictment, which is here and now realleged and incorporated by reference; and

Violations of Section 77q(a), Title 15 U.S.C., by employing said scheme and artifice to defraud, obtaining money and property by means of untrue

statements and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaging in transactions, practices, and courses of business which would and did operate as a fraud and deceit upon purchasers in the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative by the use of the United States mails, all as described in the preceding counts of this indictment and hereby incorporated by reference;

Each and all of said acts of the defendants as described in Counts I through XII, inclusive, of this indictment are here and now realleged and incorporated herein and designated as overt acts done by the said defendants in pursuance of and to effect the objects of said conspiracy; and in pursuance of said conspiracy and to effect the objects thereof, the defendants performed additional overt acts, including, among others, the following, to-wit:

1. On or about July 30, 1954, at Portland, Oregon, defendant Richard C. Williams, as president, signed the Annual Report to the Oregon Corporation Commission for General Timber Cooperative.

2. During September 1954, at Portland, Oregon, defendant Edgar Robert Errion conferred with Attorney Howard Bobbitt in connection with the preparation of articles of incorporation for Mt. Hood Hardboard and Plywood Cooperative.

3. On or about September 24, 1954, at Portland, Oregon, defendants Richard C. Williams, Glenn R. Munkers, Archie L. Bones, and Alan Wright signed articles of incorporation of Forest Products Cooperative Agency.

4. On or about July 29, 1954, at Portland, Oregon, defendants Richard C. Williams and W. W. Lock executed articles of incorporation of Mt. Hood Hardboard and Plywood Cooperative.

5. On or about October 1, 1954, defendants Richard C. Williams, W. W. Lock, and Edgar Robert Errion attended the organization meeting of directors of Mt. Hood Hardboard and Plywood Cooperative at the home of said Richard C. Williams in Milwaukie, Oregon.

6. On or about October 1, 1954, at Milwaukie, Oregon, defendants Edgar Robert Errion and Richard C. Williams presented to and obtained approval of directors of Mt. Hood Hardboard and Plywood Cooperative for a contract between Mt. Hood Hardboard and Plywood Cooperative and The Davenport Corporation.

7. On or about October 1, 1954, at Portland, Oregon, defendant Helen A. Davenport signed a contract as president of The Davenport Corporation with Mt. Hood Hardboard and Plywood Cooperative providing for payment of a fee to The Davenport Corporation of 10% of the total amount received from the sale of memberships in Mt. Hood Hardboard and Plywood Cooperative.

8. On or about October 1, 1954, defendant Richard C. Williams, as President of Mt. Hood Hardboard and Plywood Cooperative, and defendant W. W. Lock, as secretary of Forest Products Cooperative Agency, signed a fiscal agreement, under the terms of which Forest Products Cooperative Agency would receive a 10% commission on all memberships sold in Mt. Hood Hardboard and Plywood Cooperative.

9. On or about November, 1954, at 2045 E. Hawthorne in Portland, Oregon, the defendant Edgar Robert Errion instructed salesmen of Mt. Hood Hardboard and Plywood Cooperative memberships on information to be given prospective purchasers of said memberships.

10. On or about December 6, 1954, at Portland, Oregon, defendant Richard C. Williams received a check for \$1,000.00 from Forest Products Cooperative Agency.

11. On or about November 1954, at Portland, Oregon, defendant Alan Wright hired Joseph B. Gilsdorf as a salesman to sell memberships in Mt. Hood Hardboard and Plywood Cooperative.

12. On or about December 7, 1954, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of \$8,000.00, and transmitted said check to defendant Helen A. Davenport.

13. On or about November 27, 1954, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of \$6,500.00, and transmitted said check to defendant Helen A. Davenport.

14. On or about January 13, 1955, at Portland, Oregon, defendant Edgar Robert Errion obtained a check from Mt. Hood Hardboard and Plywood Cooperative payable to The Davenport Corporation in the amount of \$5,000.00, and transmitted said check to defendant Helen A. Davenport.

15. On or about November 15, 1954, at the home of defendant Richard C. Williams in Milwaukie, Oregon, defendants Glenn R. Munkers, Richard C. Williams, Edgar Robert Errion, and W. W. Lock negotiated an option with R. S. Posey for forty acres of land for a site for Mt. Hood Hardboard and Plywood Cooperative.

16. On or about April 1, 1955, at Portland, Oregon, defendant Alan Wright assured members of Mt. Hood Hardboard and Plywood Cooperative that finances for the construction of the Mt. Hood Hardboard and Plywood Cooperative plant were available through an insured bond issue.

17. On or about April 2, 1955, at Portland, Oregon, defendant Alan Wright obtained a check of Mt. Hood Hardboard and Plywood Cooperative

for \$5,000.00 signed by defendant W. W. Lock, which check was deposited in defendant Wright's personal bank account.

18. On or about May 2, 1955, defendant Alan Wright filed articles of incorporation of Clackamas Building Association, Inc. with the Corporation Commission of Oregon.

19. On or about May 12, 1955, defendant W. W. Lock signed a deed conveying Mt. Hood Hardboard and Plywood Cooperative's real estate holdings to Clackamas Building Association, Inc.

20. On or about May 9, 1955, defendant W. W. Lock delivered to defendant Alan Wright a check drawn on the funds of Mt. Hood Hardboard and Plywood Cooperative payable to Clackamas Building Association, Inc. in the amount of \$290,000.

21. On or about May 12, 1955, the exact date being to the grand jurors unknown, at Portland, Oregon, defendant Glenn R. Munkers related to Roy Tucker, an employee of Mt. Hood Hardboard and Plywood Cooperative, that he had a commitment on his person under the terms of which all finances for construction of Mt. Hood Hardboard and Plywood Cooperative's plant were provided for.

22. On or about July 6, 1955, at Vancouver, Washington, in a conversation with James A. Snyder, treasurer of Mt. Hood Hardboard and Plywood Cooperative, defendant Edgar Robert Errion introduced defendant Glenn R. Munkers as a representative of the persons who were providing the finances for construction of the plant of Mt. Hood Hardboard and Plywood Cooperative.

23. On or about November 2, 1954, at Estacada, Oregon, defendant Archie L. Bones obtained a check for \$1,000.00 from Lewis I. Orrell for the purchase of a membership in Mt. Hood Hardboard and Plywood Cooperative.

24. On or about November 10, 1954, at Port-

land, Oregon, defendant Roland L. Montgomery sold a membership in Mt. Hood Hardboard and Plywood Cooperative to Marvin Zietflow.

25. On or about October 31, 1954, at Seaside, Oregon, defendant Howard Martin obtained a check for \$1,000.00 from Roy McKendricks for a membership in Mt. Hood Hardboard and Plywood Cooperative.

26. On or about October 12, 1954, at Milwaukie, Oregon, defendant Roland L. Montgomery sold a membership in Mt. Hood Hardboard and Plywood Cooperative to Hans O. Pedersen.

27. On or about March 3, 1955, defendant Roland L. Montgomery obtained, by Western Union money order, the sum of \$2,015.00 from Mahlon E. Montgomery for a membership in Mt. Hood Hardboard and Plywood Cooperative.

28. On or about May 1955, the exact date being to the grand jurors unknown, at Portland, Oregon, defendant Roland L. Montgomery sold a membership in Mt. Hood Hardboard and Plywood Cooperative to Herman Konoske for \$1,500.00.

* * * *

That portion of Count I descriptive of the scheme to defraud is set forth:

COUNT I.

Using the Mails to Defraud

18 U.S.C. 1341

1. That prior to March 1, 1954, and continuing to the date of this indictment, the defendants, Edgar Robert Errion, also known as Bob Errion, Glenn R. Munkers, Alan Wright, Archie L. Bones, W. W. Lock, Roland L. Montgomery, and Howard Martin, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property from purchasers of memberships in Mt. Hood Hardboard and Plywood Cooperative,

hereinafter called "purchasers," by means of false and fraudulent pretenses, representations, and promises, well knowing at the time that the pretenses, representations, and promises would be false when made.

As a part of said scheme and artifice, on and prior to September 1954, defendants would and did arrange for the incorporation of an Oregon cooperative association under the name of Mt. Hood Hardboard and Plywood Cooperative (hereinafter called Mt. Hood), and would and did falsely and fraudulently represent to said purchasers of memberships that said Mt. Hood was about to construct a large and modern sawmill, plywood, and hardboard plant at Estacada, Oregon, which would be owned and operated by the members on the cooperative plan.

As a further part of said scheme and artifice, in September 1954, defendants would and did also cause to be organized and incorporated another Oregon cooperative association under the name of Forest Products Cooperative Agency, through which defendants would and did employ salesmen and carry on a large-scale sales campaign to sell memberships in Mt. Hood to purchasers residing in Oregon and elsewhere, and defendants would and did make and cause to be made to said purchasers the false representation, pretense, and promise that purchasers would obtain continuous employment and job security for themselves and their families in said operations of Mt. Hood, and would and did by this means sell memberships in said Mt. Hood at the rate of \$1,000.00 each to approximately 650 persons, for a total amount of approximately \$650,000.00.

As a further part of said scheme and artifice, defendants would and did organize and activate numerous other cooperative associations, including General Timber Cooperative, Timber Cooperative of America, Timber Cooperative of Oregon, Timber Exchange of America, and Timber Exchange of

Oregon, none of which associations had any assets or business activities, and all of which were used by defendants for the purpose of deluding and deceiving said purchasers into the false belief and impression that said cooperative organizations were able to and would furnish to said Mt. Hood all the timber needed for its operations, and were able to and would render valuable services to Mt. Hood in marketing its products.

As a further part of said scheme and artifice, defendants would and did have defendants Williams, Wright, and Lock, and persons related to them, dominate and control the board of directors of said Mt. Hood and officers of Mt. Hood.

As a further part of said scheme and artifice, said defendants would and did cause said Mt. Hood to enter into a contract with The Davenport Corporation, a corporation controlled by defendants, as a means by which said Davenport Corporation would and did claim and receive and convert to the use and benefit of defendants a large portion of the moneys which had been received from said purchasers of Mt. Hood memberships; and as a further part of said scheme and artifice and in order to make secret profits for themselves, said defendants would and did cause agents, employees, and officers of Mt. Hood to procure options in the name of said Davenport Corporation on real estate which was to be purchased by Mt. Hood, and would and did obtain funds from Mt. Hood with which to purchase said real estate in the name of said Davenport Corporation, and would and did then resell said real estate to Mt. Hood at great profit to said Davenport Corporation and defendants.

As a further part of said scheme and artifice, defendants would and did on or about May 2, 1955, cause to be organized a corporation known as Clackamas Building Association, Inc., and in order to lull said purchasers into a false sense of security and reassure them that construction of the

Mt. Hood plant was about to commence, would and did falsely and fraudulently represent to purchasers that said Clackamas Building Association, Inc. had made arrangements with, and obtained a commitment from, a responsible financial group that it would advance all necessary funds to the Clackamas Building Association, Inc. to provide for construction and equipping of the sawmill, hardboard, and plywood plant of St. Hood.

And it was a further part of said scheme and artifice that said defendants, in order to induce said purchasers to purchase memberships in Mt. Hood, and in order to lull the said purchasers into a false sense of security with respect to their purchases, and to falsely reassure said purchasers so they would induce others to purchase memberships, and in order to enable the defendants to convert to their own use and benefit and retain a large part of the moneys paid in by the purchasers for said memberships, and in order to induce said purchasers to retain their memberships, would and did make and cause to be made to said purchasers false and fraudulent pretenses, representations, and promises, including, among others, the following:

1. That purchasers of membership certificates would be assured of jobs and job security in a large, modern sawmill, plywood and hardboard plant to be constructed at Estacada, Oregon.

2. That sufficient finances had been arranged for and assured to pay for the entire cost of construction and equipping of a modern sawmill, plywood and hardboard plant, large enough to employ all members of Mt. Hood.

3. That a syndicate of wealthy timber owners, including Richard C. Williams, president of Mt. Hood, was making a large financial investment in the Mt. Hood enterprise for the purpose of providing a cooperative outlet for the manufacture of their timber into lumber and plywood.

4. That funds paid in by members to purchase certificates of membership in Mt. Hood would be retained in a reserve to provide working capital for use after commencement of operations of the plant of Mt. Hood.

5. That an adequate supply of logs for the initial operations of the plywood and hardboard plant was assured from timber held by Richard C. Williams, president of Mt. Hood, and other officers and promoters of Mt. Hood.

6. That General Timber Cooperative controlled large tracts of timber which would be adequate to supply timber for Mt. Hood's operations and would be sold to Mt. Hood at the market price.

In order that the court may more clearly understand appellee's view of the case, appellee's argument herein is first directed to appellant's Assignment of Error IV—"That the evidence is insufficient to sustain appellant's conviction", and Appellant's Assignment of Error VI—"The court erred in denying appellant's motion for a judgment of acquittal". Appellant's remaining assignments of error are answered in order.

The statement of facts (which appellant has placed in the appendix) does not set forth adequately the evidence in the record applicable to appellant. This evidence will be discussed fully in the Argument which follows immediately.¹

¹ Since appellant apparently does not contest the government's proofs that the memberships in Mt. Hood Hardboard and Plywood Cooperative which were sold in this venture were "securities" as defined in the Securities Act of 1933, and that the mails were used to execute the scheme to defraud, if such a scheme existed, attention has not been given to these points herein.

ARGUMENT

I.

**THE EVIDENCE CLEARLY ESTABLISHES A SCHEME TO
DEFRAUD AND FRAUD IN THE SALE OF SECURITIES AND
APPELLANT'S WILFUL PARTICIPATION IN A CONSPIRACY
TO COMMIT THOSE CRIMES** (Answer to Appellant's

Assignments of Error IV (App. Br. 46)
and VI (App. Br. 63).

Initially it may be pointed out that this court has frequently held that in reviewing the record at this time it will take the view of the evidence which is most favorable to the government and accept as true all facts which the evidence reasonably tends to show. *Suetter v. U. S.*, 140 F.2d 103, 107, 9 Cir. 1944; *Remmer v. U. S.*, 205 F.2d 277, 287-8, 9 Cir. 1953; *Schino v. U. S.*, 209 F.2d 67, 72, 9 Cir. 1954.

A. The Substantive Offenses, Use of the Mails in a Scheme to Defraud and Fraud in the Sale of Securities, Were Proven Conclusively.

The evidence clearly established, indeed appellant concedes, that a scheme to defraud was perpetrated upon investors in memberships in Mt. Hood (App. Br. 65). However, appellant's brief, in its description of the parts played by each of the defendants as well as others not named as defendants, somewhat subtly obscures the important and knowing role of appellant herself, characterizing her as a victim rather than an accomplice. The jury rejected this characterization claimed by appellant and found her guilty as a co-conspirator.

Without burdening the court with repetition of all of the details of the scheme set forth in appellant's brief, the circumstances of her extensive participation in it are herein summarized. In so doing, the government readily accepts appellant's description of Edgar Robert Errion as a "bold swindler" (App. Br. 65). As the evidence in the record will show, appellant well knew Errion's evil reputation, and with his other accomplices she did her part to conceal his master-minding of this scheme from the investors, many of whom had heard of Errion's prior fraudulent ventures and were apprehensive that he was a promoter of this one (Tr. 224-5, 242, 378, 452-3, 209).²

The scheme to defraud set forth in Count I, and applicable to Counts I through VII charging mail fraud³, was incorporated in the Securities Act counts (Counts VIII through XII), which additionally charged in the language of the statute the employment of the scheme, misrepresentations and omissions of material facts and fraudulent and deceitful transactions, practices, and courses of business in the sale of securities. The scheme, misrepresentations, fraudulent omissions and deceitful

² Page numbers shown relate to the transcript. Government exhibits referred to are described by the letter "G", and those of defendants by their names. The page number of the transcript at which the exhibit is admitted immediately follows the exhibit number.

³ Count IV was dismissed during the trial. Misrepresentations 3 and 5 set forth in Count I, which related to alleged timber holdings of Richard C. Williams, were withdrawn from the jury's consideration (Tr. 1760). Upon consent of all parties, the indictment against Williams was dismissed during the trial due to his serious heart condition (Tr. 1411-1414).

practices were all well-proven. The lure of the scheme was the promise made in the newspaper advertisements (Tr. 366, 456) (G. Exs. 127, 128, Tr. 746; G. Ex. 129, Tr. 749), sales literature, (Tr. 317, 469) (G. Ex. 28, Tr. 332), and by salesmen, that by purchasing a membership in Mt. Hood Hardboard and Plywood Cooperative "job security" was assured. For \$1,000 each investor-member would be guaranteed employment (Tr. 9) in a modern plywood and hardboard plant costing $3\frac{1}{2}$ to $5\frac{1}{2}$ million dollars, to be erected at once (Tr. 873). Investors were told that finances to construct the plant had been arranged for; the investors' own funds would be held and used only for working capital (Tr. 12, 66, 208-9, 230, 238, 314, 316, 367, 368, 457, 550, 780, 1204); timber in adequate supply was assured (Tr. 238, 368, 375, 383, 457, 551).⁴

⁴ Originally General Timber Cooperative was said to be the organization holding the timber to supply Mt. Hood (Tr. 368, 375). However, subsequently, General Timber Cooperative was succeeded in its purported functions by a new cooperative, Timber Cooperative of America, apparently because General Timber Cooperative had been a defendant in a prior injunction action by the SEC to enjoin it, Beaver Plywood Cooperative (a previous venture of Errion and Munkers) (Tr. 511, 517, 942, 953, 1091, 1207, 1220, 953), and others, from making fraudulent representations in connection with the sale of plywood cooperative memberships. At a later date, two additional "paper cooperatives", Timber Exchange of Oregon and Timber Exchange of America, were set up to succeed to the purported functions of Timber Cooperative of America. None of these cooperatives had any assets except the funds invested in them by Mt. Hood, itself (Tr. 953-4) (G. Ex. 135, Tr. 975; G. Ex. 8, Tr. 114, Mt. Hood Check No. 14 for \$1,000 for membership in General Timber Cooperative, and Check No. 99 for \$500 for membership in Timber Cooperative of America).

The evidence established conclusively that these representations were false. The finances were not available (Tr. 39, 758, 769) and desperate efforts to conceal this fact were made by guardedly exhibiting "letters of commitment" from fictitious persons (Tr. 524, 755, 757, 787, 988, 994) (G. Ex. 110, Tr. 657). Neither General Timber Cooperative nor its successor cooperatives had either timber or assets (Tr. 953-4).

Instead of being retained for working capital, the investors' funds were siphoned off until only approximately \$300,000 remained of the original \$550,000 paid in⁵ (G. Ex. 16, Tr. 131, Balance Sheet of Mt. Hood 7/31/55). A 10% fee for selling memberships was paid to Forest Products Cooperative Association, which was headed by Lock, Bones and Wright (Tr. 1222-28), additional charges were made by that cooperative against Mt. Hood for alleged "professional services etc." rendered by Williams, Munkers and Lock (G. Ex. 17, Tr. 131), another 10% fee was paid to The Davenport Corporation for organization and assistance in financing⁶ (Tr.

⁵ Originally the Mt. Hood plan contemplated the sale of 300 memberships. After a few weeks this was raised to 550 memberships (Tr. 1191). Actually, many more memberships were sold than the 550 limit. As members would become disgruntled, their funds were refunded and a new member was sold from the "waiting list" (Tr. 1197) (G. Ex. 13, Tr. 114, Mt. Hood Ledger, shows total receipts from memberships of \$632,500 and "refunds" of \$116,000; for examples of refund checks, see G. Ex. 10, Mt. Hood check stubs Nos. 82 to 92).

⁶ These fees were all provided for in contracts, drawn in advance of the meeting of incorporators of Mt. Hood and passed by the then eight "members" (Tr. 304-307).

1437-8, 206-7) (G. Ex. 10, Tr. 114, Mt. Hood Check stubs Nos. 98, 171, 178), salaries and expenses were liberally paid to Lock and Wright (G. Ex. 13, Tr. 114), fees as "financial engineer" to Munkers (Tr. 119-135, 1130), and a \$25,000 secret profit was taken by The Davenport Corporation on land which it purchased for Mt. Hood with Mt. Hood's own funds and employing Mt. Hood's own agents (Appellee's Br. 28-31).

B. Appellant's Participation in the Conspiracy to Commit the Substantive Crimes Was Amply Established by the Evidence.

1. Background of Appellant's Association with Errion

Helen A. Davenport, whose admitted age, uncertain from the record (Tr. 1420), but now suggested to the court dehors the record (App. Br. 2), is an experienced business woman (Tr. 1480, 1485) whose testimony on the trial showed her ready perception and discerning reply. She was no stranger to that "bold swindler" nor to his reputation as such. Dating her acquaintanceship from 1932 (Tr. 1487-88) she and her husband, since deceased, had provided some finances for his ill-fated oyster bed promotion at Coos Bay, Oregon (Tr. 1490, 1498).

In connection with the oyster bed *fiasco*, appellant was well-aware that one of the victims, Katherine Duniway, had recovered a fraud judgment against Errion for \$60,000 (Tr. 1524-27). She admitted loaning him \$30,000 (Tr. 1495) to help pay off this judgment, which, however, was left on the record undischarged (Tr. 1526-27).

As early as 1948 Errion had employed The Davenport Corporation⁷ as a "front" for his activities and had been authorized to draw checks against the corporation in connection with this enterprise (Tr. 1492-97). Appellant had joined with him in a log financing deal in Seattle, Washington, with one Kynell (Tr. 1492), the relationship terminating in a fraud suit by Kynell against Errion as well as her (Tr. 1494). She was aware that in January 1955, while the Mt. Hood promotion was being carried on, Errion had to move out of Oregon (Tr. 1495-96, 1525) because of a fraud judgment of "\$83,000 or \$93,000" against him (Tr. 1494-96, 1526). She, too, had been connected with transactions in which Errion had defrauded a Mrs. Connell of Seattle. Mrs. Connell recovered a fraud judgment against Errion and obtained a writ of garnishment against appellant who then reluctantly parted with an annuity of Mrs. Connell's which Errion had assigned to her. It is interesting to note that when questioned regarding this garnishment, appellant at first denied having anything of Errion's (Tr. 1528, 1533), then admitted having "a bill of sale of one other vehicle" (Tr. 1536), and finally, when questioned directly about having Mrs. Connell's annuity, admitted she had it and that she "gave it back" (Tr. 1537).

⁷ This corporation was organized in Oregon in 1938 by Mrs. Davenport and her husband, and upon his death she held all stock except qualifying shares (Tr. 1497). The corporation was authorized to and did engage in varied business, including real estate, money loans, property and estate management (Tr. 1420) (Davenport Ex. 3, Tr. 1542).

Appellant's home at times during this promotion included an apartment occupied by Errion and his wife (Tr. 1283, 1334, 1338). Errion held a telephone credit card for her telephone number, and charged bills running as high as \$783 (Tr. 1517-19). Errion had rented office space in the building adjoining her home (Tr. 1119) and it was there that the Mt. Hood plan was born (Tr. 1423-25).

Appellant, with Munkers and Lock, handled the marshalling of funds to pay off the mortgage on Errion's Oak Knoll Farm to keep it from going on the block in foreclosure proceedings (Tr. 1439-40, 1481-85, 1461). This property, together with such bizarre possessions as a Cadillac convertible (Tr. 605-6), found its way eventually into the corporate assets of Valley View, Inc., which it was testified was set up for the benefit of co-defendants Lock and Bones to insure repayment to them of "loans" made by them to Errion (Tr. 605-6, 1231, 1662-64, 1716-19, 1730-31). This corporation was managed by Errion's wife, Amy (Tr. 1663).

2. Participation by Appellant and Davenport Corporation in the Mt. Hood Scheme

Against this background of appellant's close association with Errion and other defendants, let us next consider her participation in the Mt. Hood promotion. At a time when she knew that Errion had been found civilly liable for the fraud judgments in Oregon (Tr. 739, 1495, 1525), he discussed with her an arrangement whereby the bank account of The Davenport Corporation would be used as a transient depository for the

fee to be received by Errion for the Mt. Hood promotion (Tr. 1426-29). This fee was to be 10% of the total membership funds received by Mt. Hood. Appellant's testimony that this banking convenience for Errion was set up to protect him from a judgment against him (Tr. 1426) became rather obscure when she was put to an explanation for the necessity of the arrangement, since the fraud judgment which she claimed to be the reason therefor had been paid off and merely left on the record (Tr. 1496, 1527).

Regarding her arrangement with Errion, appellant testified (Tr. 1427):

"Then he asked me—I asked him what my duties would be, and he said that there would be none. There would be no business conducted of any kind, that I simply would handle his 10% that he was to receive, and that I would open a special bank account in the name of The Davenport Corporation and accept the 10%, accept the money that he received there, and then pay it out to his order . . ."

Despite appellant's protestations of her ignorance, the evidence is convincing that she knew much more of the details of the Mt. Hood scheme than she would admit. She knew that the plan was based on the idea of constructing a large and modern plant to "provide labor under fine conditions" for the men that belonged to the cooperative, complete with plans for housing, churches, schools and recreation centers (Tr. 1425). Appellant, of course, realized that such an alluring proposition would quickly attract large numbers of common workers throughout Oregon, all in search of

the promised "job security". In fact, she inquired frequently at the Mt. Hood office "how the money was coming in" (Tr. 1282). Certainly this astute business woman knew that this required financing on a large scale. With this knowledge, she signed her name as president of The Davenport Corporation to the very contract by which Errion's 10% fee was allowed, which contract provided that the fee was paid for services, including "assisting the cooperative in obtaining financing" (Tr. 1479) (G. Ex. 6, Tr. 285, Contract between Mt. Hood and The Davenport Corporation contained in Minute Book of Mt. Hood). This contract also provided that these duties were to be performed by The Davenport Corporation with "due diligence".⁸

The words:

"Copyrighted by The Davenport Corporation
Portland, Oregon"

were imprinted on the sales literature (G. Ex. 28, Tr. 332), the applications for membership forms (G. Ex. 130, Tr. 877) and even on the membership certificates (G. Ex. 4, Tr. 15). Appellant was fully aware this had been done, and in fact appears to have been zealous to keep in her possession the copyrights obtained from Washington, D. C. on this material "because they were her property" (Tr. 1283). She again claimed that "The copyrights were made out in the name of The Daven-

⁸ At the very outset of the promotion, appellant notarized the document by which the selling cooperative, Forest Products Cooperative Association, was organized (Tr. 1184). This cooperative also received a 10% fee for the sale of memberships (G. Ex. 27, Tr. 283) of which Errion, Munkers, Lock, Bones and Wright all received some part.

port Corporation because Mr. Errion could not have them made out in his name" (Tr. 1430), perhaps implying more frankly than intended that Errion was plainly hiding behind her then reputable skirts, with her permission.

Appellant's "arm-in-arm" collaboration with Errion and other defendants in the studied concealment of his identity with this promotion is made patently evident in the testimony and exhibits relating to the handling of funds through The Davenport Corporation bank account (Tr. 1441-44). Appellant's testimony in this connection was as follows (Tr. 1441):

"A Now, when this money would come in from the Hardboard Company while Mr. Errion was in Oregon he sometimes went right to the bank, came over and went right to the bank with me, and his wife, I think, drove the car because he does not drive, and took him to the bank. I would deposit the money and get cashier's checks and give them to him.

Q Well, now, let's explain that a little further please. A great many of these checks that appear in there were drawn in favor of the Davenport Corporation?

A They were drawn for what?

Q They were drawn payable to the Davenport Corporation?

A Yes, and those were handed right direct to him. Now, those were done—he explained to me that those were done and they were done right in the bank there, the checks were drawn to the Davenport Corporation, and then I endorsed them and handed them to him because he could not do business in his own name on account of that.

Q What did you do, again, now?

THE COURT: You were talking about the fact that he did this because he couldn't do business in his own name? What did he do?

THE WITNESS: I didn't understand it.

THE COURT: You were telling us in your last answer that he did certain things because he couldn't do business in his own name. Now what was it that he did?

THE WITNESS: Well, he took these, and he wanted these checks drawn to the Davenport Corporation and just endorsed because he couldn't have them drawn directly to him, and I endorsed them and handed them to him.

MR. DIBBLE: Q You are speaking now of the checks that you received from the Mt. Hood?

A Yes, sir.

Q They were made payable to the Davenport Corporation?

A And endorsed and immediately deposited, and a check bought, signed over to Mr.—and endorsed and given to Mr. Errion.

Q He would bring the check to you?

A Yes, sir.

Q It was payable to the Davenport Corporation?

A Yes, sir.

Q Would you and he go to the bank together?

A Yes.

Q That is this First National Branch down here at Sixth and Morrison?

A Yes.

Q Then do I understand that you endorsed the check on behalf of the Davenport Corporation; is that right?

A I would buy a cashier's check and endorse the cashier's check and give it to Mr. Errion.

Q First you would endorse the Mt. Hood check?

A Yes, sir.

Q On behalf of the Davenport Corporation?

A And deposit it.

Q Yes; then you would purchase a cashier's check from the bank?

A Right there.

Q Is that right?

A Yes, sir.

Q And that would be made payable, the cashier's check, to the Davenport Corporation?

A Yes, sir.

Q Then, as I understand it, you would endorse that cashier's check?

A Yes, sir.

Q On behalf of the Davenport Corporation?

A That's right.

Q You would turn that check over to Mr. Errion?

A Yes, sir.

Q Did that happen on numerous occasions?

A Did what?

Q Did that happen on many occasions?

A Yes."

The mass of applications for cashier's and certified checks made by her personally (G. Ex. 58-66, Tr. 618) (G. Ex. 71-107, Tr. 820), her personal endorsement of each of these cashier's checks for cash or for the reissuance of still more cashier's checks to be turned over to Errion, who was standing literally at her elbow, are actions scarcely in character for one devoted only to seeing that "everything was done correctly and in a businesslike way" (Tr. 1468). Her explanation that Errion needed the cashier's checks because he might have an opportunity to buy timber at a very advantageous price and the checks could be used instantly (Tr. 1459) was no more convincing than her statement that she did not know what Errion did with the checks because "I never asked any questions" (Tr. 1452).

The disbursements made by appellant from The Davenport Corporation account other than for cashier's checks (G. Ex. 56, Book of Cancelled Checks and Check Stubs of The Davenport Corporation, Tr. 627) are also

illuminating of appellant's relationship to co-conspirators Errion, Lock, and Munkers. During the period when the account was opened and being handled by her, she personally signed over 100 checks for amounts totalling approximately \$110,000. From this account she issued checks to Lock (Tr. 1461) (G. Ex. 56, Checks No. 100, \$700; No. 120, \$300; No. 152, \$600) and to herself (No. 157, \$500; No. 166, \$1,000) for repayments on "loans" allegedly made to Errion to save his Oak Knoll Farm from a mortgage foreclosure (Tr. 1439), a deal in which Munkers again lent her his helping hand with the details (Tr. 1483-84). From this account she issued checks to Munkers (No. 102, \$150; No. 104, \$350; No. 115, \$150) for "expenses in connection with his California trip" (Tr. 1045) and for business expenses (No. 196, \$500, to First National Bank for account of Glenn Munkers). She paid herself \$2,500, Check No. 181, in part payment on the amount Errion allegedly promised her for use of her bank account (Tr. 1459-60).

On February 4, 1955, appellant issued Check No. 165 of The Davenport Corporation in the amount of \$10,000 for the purchase of timber lands in California. Her testimony regarding this transaction gives the lie to her pretense that her interest in The Davenport Corporation bank account was merely a clerical one for the convenience of Errion (Tr. 1445). Appellant testified in connection with this \$10,000 check, that she had received a long-distance telephone call from Errion in California, requesting that she send him \$10,000 to buy a strategic piece of timber (Tr. 1461). This was for use in connection with the promotion of a second ply-

wood cooperative to be set up in California, known as Mt. Shasta Hardboard and Plywood Cooperative (Tr. 1464, 1498-99).⁹ Despite her earlier testimony concerning The Davenport Corporation bank account that "every cent of it went to Mr. Errion's order" (Tr. 1445), appellant now appeared in the unexpected role of refusing to send to Errion the \$10,000 which he requested to purchase this timberland. Instead, she insisted that the funds go through the hands of her nephew, Ira Weaver, and be kept under her control to protect her interest and good name (Tr. 1499-1501, 1463-65), and she was anxious that the funds be used only to buy land "so that I could hold the property to get something on the indebtedness he had" and not to start another promotion (Tr. 1501-2). In fact, it appears that the moneys were

⁹ The "grand plan" contemplated by Errion and his associates called for the formation of at least nine cooperatives, patterned after the Mt. Hood venture, to be located throughout the nation. In each case, The Davenport Corporation was to assist in the financing (Tr. 1270-71. Following the incorporation of Mt. Hood in Oregon, the second unit, Mt. Shasta Hardboard and Plywood Cooperative, was organized in California. Errion, Munkers and Mrs. Davenport's nephew, Ira Weaver, were among the organizers (Tr. 1271) and Wright was in charge of the sale of memberships. Munkers was employed by The Davenport Corporation to purchase property for Mt. Shasta (Tr. 1132) and as early as October 1954 had received checks signed by appellant for "Expenses California trip" (G. Ex. 56, Checks Nos. 102, 104, 115), and on February 22, 1955, appellant issued Davenport Corporation Check No. 178 to Ira Weaver for "Business expenses in California". Thirty-three memberships in Mt. Shasta were sold for a total of \$99,000. The promotion was halted abruptly by a cease and desist order issued by the California Corporation Commission (Tr. 1272, 1507).

so used to buy land in the name of The Davenport Corporation, where apparently title still remains (Tr. 1502, 1473).

When questioned as to whether her nephew, Weaver, had warned her of Errion's reputation as a swindler and whether she thereafter continued to allow him to use The Davenport Corporation bank account, she replied (Tr. 1505-08), "Well, I don't consider that account so very much my account when it was 90% his account and 10% my own, but I didn't get the 10%."

Appellant's concern for the welfare of Errion extended even beyond her term as his banker. When it was necessary for her to travel and be away from the situation, she enlisted to replace her as his financial secretary, one Freda Piatt, and entrusted her with the authority to use The Davenport Corporation bank account (Tr. 566-69). Piatt then drew out the remaining funds in the account and converted all cashier's checks payable to The Davenport Corporation into cash. She carried around in her handbag at one time an amount of at least \$34,000 (Tr. 574-75).

The use of The Davenport Corporation to siphon off the Mt. Hood investors' funds by taking secret profits on real estate deals which were risk-free to The Davenport Corporation was an important feature of the fraudulent scheme in this case and could not have been accomplished without the direct participation of Mrs. Davenport (Tr. 1033) and her corporation's bank account. These unconscionable transactions may be summarized from the testimony and exhibits as follows:

Two tracts of land were involved, identified by the names of their former owners as the Posey tract and the Alspaugh tract. An option to purchase the Posey tract was negotiated on November 18, 1954 by Williams, then president of Mt. Hood, Lock, its secretary, Errion and Munkers (Tr. 904-6), who was paid by Mt. Hood for his services in selecting a site (Tr. 1110-13) (Munkers Ex. 3, Tr. 1074). The option price was \$14,000, and the option was taken in the name of Lock (G. Ex. 138, Tr. 911), who paid \$100 at that time and \$550 later, for which he was reimbursed by check of The Davenport Corporation issued by Mrs. Davenport December 6, 1954 (G. Ex. 56, Tr. 1516, Davenport Corporation Check No. 128). The option was to be exercised by the payment of the balance of \$13,250 before February 18, 1955.

On December 17, 1954, a 90-day option on the Alspaugh tract for a price of \$19,500 was negotiated by Lewis K. Banks (G. Ex. 136, Tr. 926), who was in the employ of Mt. Hood (Tr. 916). At Errion's instruction the option ran to The Davenport Corporation (Tr. 920). Banks advanced his own funds to pay the \$500 option payment, for which he was reimbursed by a check of The Davenport Corporation issued by Mrs. Davenport (Tr. 921, 1472, 1516).

With the site selected by Mt. Hood employees and agents, under option to The Davenport Corporation for a total price of \$33,500, the directors of Mt. Hood, including Lock and his brother-in-law, Current, on January 24, 1955 authorized "that a check be made out to

The Davenport Corporation for \$31,500 to apply on the purchase of 90 acres of land at Estacada" (G. Ex. 6, Minutes of Mt. Hood). Pursuant to this resolution, on February 2, a check in this amount was issued by Mt. Hood to The Davenport Corporation (G. Ex. 8, Mt. Hood Check No. 150). Appellant then issued a check of The Davenport Corporation on February 10, 1955, for \$19,087.57 to Title and Trust Company for the balance due on the Alspaugh property (G. Ex. 56, Davenport Corporation Check No. 170). Munkers and Mrs. Davenport in person had this check certified at the bank (Tr. 1038), and Munkers then delivered it to the title company. Mrs. Davenport personally signed the escrow agreement delivered with the check (Munkers Ex. 2, Tr. 1036).

At this point in the transaction The Davenport Corporation had a net profit balance of approximately \$12,000. On February 10, 1955, the Mt. Hood directors, again including Lock and Current, authorized "that checks be issued to pay for the balance of our land at Estacada in the amount of \$27,000." (Ex. 6, Minutes of Mt. Hood). Pursuant to this resolution, on February 12, 1955, a check in the amount of \$18,000 was issued by Mt. Hood to The Davenport Corporation (G. Ex. 8, Mt. Hood Check No. 169). The Davenport Corporation now had a net balance from the payments received from Mt. Hood of approximately \$30,000. On February 14, 1955, appellant issued a check of The Davenport Corporation to the Poseys in the amount of \$13,250, which Munkers delivered (Tr. 1039). On February 16, 1955,

Mt. Hood issued its third check, for \$9,000, to The Davenport Corporation for the balance of the \$27,000 authorized February 10 (G. Ex. 8, Mt. Hood Check No. 177). Thus the Davenport Corporation, risking nothing but small option payments (if, indeed, there was any risk at all involved in the arrangement), and acting through and with the connivance of Mt. Hood's own officers and employees, was able to drain off from the Mt. Hood investors' funds which were to be "reserved for working capital", a secret profit of over \$25,000.¹⁰

The testimony of appellant as to her knowledge of this unconscionable deal rings neither true nor plausible. She acknowledged that she was a woman experienced in real estate transactions (Tr. 1467) and had authorized Munkers to act for her "to see that everything was done correctly and in a businesslike way" (Tr. 1468, 1033-38). She received and disbursed all checks relating to the transactions, both for the option payments and the balances of the purchase price, signed the escrow agreement on the Alspaugh property, attended to the certification of checks and the execution of the deed of conveyance. She even gave Munkers the check for revenue stamps to be affixed to the deed (Tr. 1103). Yet when it came to honestly admitting she knew the price of the land (Tr. 1468-71) or that The Davenport Corporation had realized a profit on the transactions¹¹ she denied any knowl-

¹⁰ The deeds from Alspaugh and Posey were taken in the name of The Davenport Corporation (G. Exs. 139-40, Tr. 935), which then deeded the combined properties to Mt. Hood by deed signed by appellant as president of The Davenport Corporation (Tr. 1471) (G. Ex. 141, Tr. 935).

edge of the details and testified that she did not even know her bank balances (Tr. 1510-15). Yet appellant, under previous examination by her own counsel, had testified with a vivid recollection, covering nearly twenty pages of transcript, to the minute details of the nearly one hundred other checks she had written and recorded in her "little book" (Tr. 1433, 1443-65).

C. Appellant's Guilt or Innocence Was Properly Submitted for the Jury's Determination Upon These Facts.

Appellant argues that the evidence to support the finding of the illegal agreement in this case "as to each accused had to be direct evidence of actual knowledge of the fraud" (App. Br. 53). This appears to be an incorrect statement of the law.¹²

In *Blumenthal v. U. S.*, 158 F.2d 883, 9 Cir. 1946, aff. 332 U.S. 539, this court said, at page 889:

¹¹ It is interesting to note that co-defendants Munkers (Tr. 1103-4) and Lock at least admitted that they knew of the secret profits on the deal. Lock testified that he didn't like it but kept his mouth shut (Tr. 1696-97).

¹² Appellant also contends: "Circumstantial evidence of knowledge, however, cannot preclude, as a matter of law, a reasonable hypothesis of actual ignorance . . ." (App. Br. 53). The law in this circuit is set forth succinctly in *Charles v. U. S.*, 215 F.2d 831, 9 Cir. 1954, at 833:

"It is true that some of the evidence was circumstantial. However, it could not and cannot be said, as a matter of law, that reasonable minds could not conclude that the evidence was inconsistent with every reasonable hypothesis of innocence. Therefore whether the evidence was inconsistent with every such hypothesis was a question for the jury and not for the District Court or this court to determine." See also *Holland v. U. S.*, 348 U.S. 121.

"The claimed offense is one which from its very nature can rarely be proved by direct evidence. Ordinarily only the results of a conspiracy, and not the private plottings, are observed. Like any other issue of fact, conspiracy may be proved by circumstantial evidence. . . . To constitute an unlawful conspiracy no formal agreement is necessary. . . . The crime is almost always a matter of inference deduced from the acts of the persons accused, which are done in pursuance of an apparent criminal purpose. . . . The proof need go no further than reach that degree of probability where the general experience of men suggests that it has passed the mark of reasonable doubt. . . ." (Cases cited omitted)

See also *Levine v. U. S.*, 79 F.2d 364, at 370, 9 Cir. 1935; *Allen v. U. S.*, 4 F.2d 688, 691, 7 Cir. 1924. In *Pereira v. U. S.*, 347 U.S. 1, conviction on conspiracy was sustained although there was no direct evidence of an agreement to use the mails, the court holding that it was proper to allow the jury to determine from the circumstances and the close association of the co-conspirators whether the "details related to the realization of their common goal had been agreed upon".

On the facts established at the trial there was definite and ample evidence from which a jury might find that Errion and his associates, including appellant, were by agreement pursuing the common purpose of perpetrating a fraud upon investors in Mt. Hood memberships. The fraud consisted of misrepresentation and omission to inform the investors of material facts in regard to at least three important matters:

1. The ability of the promoters to supply financing for a plan which would provide job security to the investors.

2. The availability of timber resources to sustain the plant's operations.

3. The preservation of the investors' funds to provide a reserve of working capital when operations would commence.

The fraud included the skillful siphoning off of these fraudulently-obtained funds of investors, through various means, including payment of fees to The Davenport Corporation and Forest Products Cooperative Association, purchase of memberships in General Timber Cooperative and Timber Cooperative of America, secret profits on land sold to Mt. Hood, and finally by the apparent attempt to appropriate the entire remaining assets of Mt. Hood through the \$290,000 check payment to Clackamas Building Association, Inc.

All the defendants shared in the ill-gotten gains. Munkers, Lock, Bones and Wright collected "fees" and salaries from Forest Products Cooperative Association, The Davenport Corporation and Mt. Hood. Errion and appellant shared in the \$80,000 collected by The Davenport Corporation, appellant repaying herself on alleged "loans" made to Errion, withdrawing \$10,000 to buy timberlands in California in the name of The Davenport Corporation and withdrawing an additional \$2,500 as payment on her "fee".

The government does not claim that appellant participated in each facet of the scheme nor was such required to sustain her conviction. As explained in *Allen v. U. S.*, *supra*:

"If the parties acted together to accomplish something unlawful, a conspiracy is shown, even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others."

Appellant, having knowledge of the representations made and being intimately associated with the organization of the project, was chargeable with responsibility for the acts of the agents, salesmen and co-conspirators and had a duty to disclose to them and to investors the real facts concerning such material matters as the financing that had been obtained for Mt. Hood, the timber that was available to it and the manner in which their funds were being dissipated. Her position is the worse, since with full knowledge that the financing of the plant was ever becoming a more crucial question during the sales campaign and thereafter before the funds were dissipated, she made no effort to question Errion or to determine the availability of financing (at least there is not a shred of evidence that she did), admitting finally that she had no idea where the finances were coming from (Tr. 948).

Van Riper v. U. S., 13 F.2d 961, 966, 2 Cir. 1926:

"Sweet was the company's president, and negotiated the contract with Kuykendall and the lease with Tingley. . . . It is, of course, impossible to say that he must have known how the stock was being sold, nor is it necessary. A man who connects himself so closely with such an enterprise presumably has a live interest in it, which leads him to keep informed. His opportunities for information and his motive to get it justify a conclusion which he may be called upon to answer. In the end the question lies with a jury how far he has succeeded."

The attempt by appellant, while on the witness stand, to dodge all responsibility and claim complete ignorance of the details of the scheme may have weighed heavily with the jury, viewing firsthand her wary demeanor. As stated in *Seeman v. U. S.*, 96 F.2d 732, 5 Cir. 1938:

“The jury was entitled to consider his manner of testifying, his interest in the case, and any evidence tending to contradict him. We do not know what impression he made upon the jury. But it well may be that the jury concluded he was not truthful in attempting to explain the transaction of the telegram. If so, that would tend to show his consciousness of guilt and was evidence to be considered in connection with all the other evidence in the case.”

II.

THE INDICTMENT PROPERLY CHARGED APPELLANT WITH THE CRIME OF CONSPIRACY (Answer to Appellant's Assignments of Error I and I-A).

The language of Count XIII, the conspiracy count, follows the usual form. See *Nemec v. U. S.*, 178 F.2d 656, 9 Cir. 1954; *Donaldson v. U. S.*, 248 F.2d 364, 9 Cir. 1957; *Allen v. U. S.*, 186 F.2d 439, 9 Cir. 1951, cert. den. 341 U.S. 948; *Walters v. U. S.*, CCH ¶ 90851, 9 Cir. Apr. 11, 1958. It alleged defendants performed twenty-eight overt acts in addition to the acts alleged in the substantive counts. Appellant was specifically identified with four of the described overt acts Nos. 7, 12, 13, 14. The alleged scheme which was set forth in Count I and incorporated by reference in the conspiracy count, included the making of false representations, namely,

that investors in memberships were assured of a job in a large, modern plywood-hardboard plant and sawmill, that finances for the construction of the plant had been assured, that investors' funds would be held in reserve and used only for working capital, that General Timber Cooperative controlled huge timber tracts which would supply Mt. Hood's operations; the scheme also embraced arrangements for the incorporation of the principal vehicle for the fraud, Mt. Hood Hardboard & Plywood Cooperative and for the incorporation of the selling cooperative, Forest Products Cooperative Agency, and other "window dressing" cooperatives, including General Timber Cooperative, Timber Cooperative of America, Timber Cooperative of Oregon, Timber Exchange of America and Timber Exchange of Oregon, none of which, it is claimed, had any substantial assets; the arrangements for the contract with The Davenport Corporation whereby defendants would siphon off a portion of the monies from the sale of memberships and further siphon off funds by an unconscionable markup in the price of real estate to be purchased with the membership funds; and, finally, the organization of Clackamas Building Association, Inc., reportedly to make good the promise of financing its construction of the plant on which the entire venture hinged. This certainly furnished appellant with an outline of the scheme sufficient to enable her to prepare her defenses and defend against a charge should she again be accused. If, as Count XIII, the conspiracy count, charged, she conspired, combined, confederated, and agreed with the other named defendants to violate the Mail Fraud Statute and the Securities Act

by employing said scheme in connection with the sale of memberships of the Mt. Hood Hardboard & Plywood Cooperative, she was clearly guilty of a crime.

It is difficult to ascertain the exact nature of appellant's complaint with respect to the government's indictment. Initially, it should be pointed out the record reveals that appellant filed no motion attacking the indictment prior to the trial, and at no time prior to the government's case was any protest made that she was unable to defend herself for lack of specificity.¹³ Under Rule 12(b)(2) and (3) of the Federal Rules of Criminal Procedure, appellant might properly raise an objection to the failure of the indictment to charge an offense at any time during the pendency of the proceedings; no mere defect as to the form of the indictment, however, may properly be raised after having proceeded to trial.¹⁴

Appellant (App. Br. 5) refers to the fact that the "conspiracy count contains no independent allegations

¹³ Appellant did join with the other defendants at the close of the government's case on motion for acquittal based on the ground "that each of the several and separate counts in the indictment fails to state sufficient facts to constitute a crime as claimed by the government, and the facts are insufficient in the indictment, and, secondly, that the facts adduced at the trial have been insufficient to sustain a conviction in each of the several instances as to each of the separate defendants" (Tr. 1013, 1020).

¹⁴ See note 13 to Rule 12, Federal Rules of Criminal Procedure; *U. S. v. Williams*, 202 F.2d 712, 5 Cir. 1953, *reh. den.*, 203 F.2d 572, *cert. den.*, 346 U.S. 822; *Witt v. U. S.*, 196 F.2d 285, 9 Cir. 1952, *cert. den.*, 344 U.S. 827; *Lelles v. U. S.*, 241 F.2d 21, 9 Cir. 1957, *cert. den.* 353 U.S. 974, *reh. den.*, 354 U.S. 944.

of fact". If appellant is suggesting that the conspiracy count is inadequate in incorporating by reference the scheme alleged in Count I merely because appellant is not charged with a violation in Count I, she has mistaken the purpose of incorporation by reference, which is not to charge defendants with the crime alleged in the prior count but only to avoid repeating the description of the acts set forth in that count. Thus it has been held that even where the count setting forth a mail fraud scheme is fatally defective, subsequent counts might properly utilize the defective count as a "reference" for the purpose of incorporating the scheme set forth therein. See, e.g., *U. S. v. Monjar*, 47 F. Supp. 421, 425 (D. Del. 1942), aff'd 147 F.2d 916, 3 Cir. 1944, cert. den. 325 U.S. 859, citing *Touhy v. U. S.*, 88 F.2d 930, 8 Cir. 1937, and *Bell v. U. S.*, 100 F.2d 474, 5 Cir. 1938. Cf. *U. S. v. Cohen*, 145 F.2d 82, 95, 2 Cir. 1944, cert. den. 323 U.S. 799, discussed below.

As stated by the court in *Chew v. U. S.*, 9 F.2d 348, 352, 8 Cir. 1925:

"We think that the allegations of this count, including by reference the matter in the preceding counts, constitute a direct charge that the defendants conspired to devise the scheme set forth on those counts and to make use of the mails in carrying it out. The allegation of conspiring includes the element of intent. *Frohwerk v. United States*, 249 U.S. 204, 209, 38 S.Ct. 249, 63 L.Ed. 561. The allegations as to the overt acts make complete the conspiracy count."

If appellant's contention is that the indictment is defective on the basis that failure of the grand jury to

charge her with violation of the substantive counts was tantamount to acquittal (App. Br. 54, 57) and precludes the facts alleged therein from being used against her in the conspiracy count, it is based on false assumptions of fact and law. The fact that a grand jury has not indicted can in no way be construed to indicate that a person may not be guilty. *Alexander v. U. S.*, 95 F.2d 873, 8 Cir. 1938, cert. den. 305 U.S. 637. The constitutional provision against double jeopardy precludes a person from being tried again for the same offense after an acquittal, but the same facts can be lawfully presented time and again to successive grand juries and the failure of earlier grand juries to indict would have no bearing upon the right of subsequent grand juries to do so.¹⁵ *U. S. v. Thompson*, 251 U.S. 407.

The argument also falsely assumes that an acquittal on the substantive counts would compel an acquittal on the conspiracy count (App. Br. 39). *Shayne v. U. S.*, 9 Cir. No. 15406, May 10, 1958. That this is not so is made clear by cases holding (a) that a person can be guilty of a conspiracy to commit an act even though he may be not guilty of the substantive offense, and (b) that even if a verdict is inconsistent it may nevertheless be sustained. With respect to the first of these propositions, *U. S. v. Cohen*, *supra*, is a direct holding. There, the Circuit Court held:

“As to count 19 [mail fraud], while there was

¹⁵ Indeed, it is established that the same facts can be used to support the conviction of an individual of three separate crimes requiring different elements. *Gore v. U. S.*, 26 Law Week 4532 (1958) and *Blockburger v. U. S.*, 284 U.S. 299, cited therein.

ample testimony to support a verdict that Joel Rosenberg was party to the fraud upon the McDonalds, Mussman was altogether vague as to the time when Joel joined him and Goldie in the transaction, and there was no other testimony to fix it. The 'count letter' being dated December 7, 1936, and the posting of the letter being under all the authorities the corpus delicti, there was no evidence to support the verdict. *Olsen v. U.S.*, 2 Cir., 287 F. 85; *Armstrong v. U.S.*, 10 Cir., 65 F.2d 853, 857. For these reasons the conviction of Joel Rosenberg on counts 7 and 19 must be reversed.

"On the other hand his conviction on the conspiracy count should be affirmed. As we have just said, there was testimony directly connecting him with the McDonald frauds, and his argument that the jury should not have believed it is unsound, as we have seen."

And see also *Van Riper v. U. S.*, 13 F.2d 961, 966-967, 2 Cir. 1926; *Allen v. U. S.*, 186 F.2d 439, 444, 9 Cir. 1951, *cert. den.* 341 U.S. 948 (1951). Cf. *Pereira v. U. S.*, 347 U.S. 1 (1954).

As to the permissibility of inconsistent verdicts, this Court said in *Coplin v. U. S.*, 88 F.2d 652, 661, 9 Cir. 1937, *cert. den.* 302 U.S. 703:

"This question has been so recently and so fully discussed by this court that voluminous citation of authority is unnecessary. See *Macklin v. United States (C.C.A.)*, 79 F.2d 756, 758-759, and the cases there cited."¹⁶

¹⁶ The Macklin case, 9 Cir. 1935, cites, *inter alia*, *Dunn v. U. S.*, 284 U.S. 390 (1932); and *Bilboa v. U. S.*, 287 Fed. 125, 127, 9 Cir. 1923. Among the subsequent cases in this Court to the same effect are *Suetter v. U. S.*, 140 F.2d 103, 108 (1944); *Stein v. U. S.*, 153 F.2d 737, 744 (1946), *cert. den.*, 328 U.S. 832 (1946); *Robinson v. U. S.*, 175 F.2d 4, 10 (1949), *cert. den.*,

Whatever may have been the reason for the inclusion of appellant only in the conspiracy count, the grand jury, was, of course, under no compulsion to charge her with additional crimes. It is anomalous for her to complain that she was charged with only one crime in one count rather than with three types of crimes in 13 counts.

III.

THE COURT PROPERLY DENIED APPELLANT'S MOTION FOR SEPARATE TRIAL¹⁷ (Answer to Appellant's Assignment of Error II).

Rule 14 of the Federal Rules of Criminal Procedure, which is a restatement of existing law, provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

An application by a defendant for separate trial¹⁸

338 U.S. 832, (1949); *Catrino v. U. S.*, 176 F.2d 884, 888 (1949); *Langford v. U. S.*, 178 F.2d 48, 52 (1949), *cert. den.*, 339 U.S. 938 (1950); *Bridgman v. U. S.*, 183 F.2d 750, 753 (1950); and *Thomas v. U. S.*, 227 F.2d 667, 671 (1955), *cert. den.*, 350 U.S. 911.

¹⁷ Appellant's argument under Assignment of Error II appears directed to the claim of prejudicial joinder and also error in the court's instructions. The latter point is considered herein under appellee's argument Point IV.

¹⁸ Appellant's motion for severance, filed prior to the trial, was in the following language: "The Defendant Helen A. Davenport by and through her Attorney Dan M. Dibble, moves the

is addressed to the discretion of the court, and as a general rule should be denied to avoid piecemeal trial of criminal cases in the absence of a compelling showing of prejudice. *Tincher v. U. S.*, 11 F.2d 18, at 21, 4 Cir. 1926, *cert. den.* 271 U.S. 664; *Shockley v. U. S.*, 166 F.2d 704, 9 Cir. 1948, *cert. den.* 334 U.S. 850. The motion is rarely granted. In *Olmstead v. U. S.*, 79 F.2d 842, 9 Cir. 1927, *cert. den.* 275 U.S. 557, *aff.* 277 U.S. 438, the Ninth Circuit Court of Appeals said:

“In conspiracy cases, the rule in the federal courts is that severance is permissible, and that the courts are vested with judicial discretion to order it, but that the exercise of that discretion is not subject to review except for abuse. *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 400; *Reike v. U. S.*, 227 U.S. 131, 33 S. Ct. 226, 57 L. Ed. 450. *Ann. Cas.* 1914C, 128; *Scheib v. United States (C.C.A.)*, 14 F.(2d) 75.”

In cases of mail fraud and conspiracy it is a general rule that persons jointly indicted should be tried together. *Hall v. U. S.*, 168 F.2d 161, D.C. Cir. 1948. As stated in *Dowdy v. U. S.*, 46 F.2d 417, at 421, 4 Cir. 1931:

“Where two or more defendants are indicted for a joint transaction it is inadvisable to split up the case into many parts for separate trials, in the absence of very strong and cogent reason therefor. This is particularly true in conspiracy charges from the very nature of the case.”

To the same effect see *U. S. v. Schwartzberg*, 241 Fed. 348, 2 Cir.; *U. S. v. Allen*, 202 F.2d 329, D.C. Cir. 1952; *U. S. v. Lebron*, 22 F.2d 531, 2 Cir. 1955.

Court for an order allowing and permitting a severance of the trial of her case in the above entitled action upon the ground and for the reason that she would be prejudiced by remaining joined as a co-defendant.”

Whatever inconvenience may result to the defendants in this case, it may be said in the language of Judge Augustus Hand in *Fradkin v. U. S.*, 81 F.2d 56, 2 Cir. 1936: "A man takes some risk in choosing his associates and if he is haled into court with them he must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats."

As will be indicated herein under Point III, appellant's rights were safeguarded by the court's instructions and precautionary remarks throughout the trial. In a case such as this, where each of the parties to the scheme contributed acts which were intended to and did contribute to the overall fraudulent plan, fairness to all accused, as well as to the government, requires that the entire story be unfolded in a single trial. That the jury here carefully weighed the evidence as to each defendant is indicated by the fact that the defendant Martin was acquitted while the other defendants were convicted.

IV.

THE JUDGE'S INSTRUCTIONS ON THE SUBSTANTIVE COUNTS WERE NOT PREJUDICIAL TO APPELLANT

(Answer to Appellant's Assignment of Error III).

The essence of the appellant's third assignment of error is apparently that her conviction should be reversed because in discussing the substantive portions of the indictment the judge, in his charge, did not make sufficiently clear that appellant was not charged with the substantive offense but merely with the offense of

conspiracy (App. Br. 43-46). The short answer to this contention is that the jury did not purport to find appellant guilty of any count other than conspiracy. Hence there seems to be no basis whatsoever for appellant's contention.

Appellant admits, moreover (App. Br. 45), that no exception was taken to the instruction in this regard and appellant's counsel suggested no qualifying instruction. Rule 30 of the Federal Rules of Criminal Procedure states: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict." Although Rule 52(b) permits an appellate court to notice plain errors or defects affecting substantial rights which were not brought to the attention of the lower court, nevertheless it is only where an error is seriously prejudicial that it will be noticed in the absence of objection. *Himmelfarb v. U. S.*, 175 F.2d 924, 9 Cir. 1949, cert. den. 338 U.S. 860. The court's instruction can hardly be characterized as seriously prejudicial to defendant in this case.¹⁹

¹⁹ Indeed, the charge appears to be more favorable to appellant than was necessary, if the judge required the jury to find her to be a participant in the scheme in order to convict her of conspiracy. A conviction can be had for conspiracy even though the substantive offenses have not occurred. See *Troutman v. U. S.*, 100 F.2d 628, 10 Cir. 1938, where a defendant's conviction only on a conspiracy charge in a mail fraud and Securities Act case was upheld. See also those cases affirming inconsistent verdicts set forth in footnote 11, *supra*. That the judge was too favorable to appellant can, of course, constitute no ground for reversal. See *U. S. v. Seavey*, 180 F. 837, 840, 3 Cir. 1950, cert. den., 339 U.S. 979; *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150,

The instructions of the Court relating to the conspiracy count on which appellant was charged commenced with the statement, "Count XIII is the conspiracy count and I now desire to take up that count with you." (Tr. 1790). Thereafter, the instructions given on conspiracy are spread over nearly nine pages of the transcript, and instruct in long-approved language on the elements of that offense. In addition, as conceded by appellant (App. Br. 43), the Court in at least three places in its instructions made reference to the fact that Mrs. Davenport was charged only in Count XIII and cautioned the jury (Tr. 1774):

"Although the evidence introduced may be considered by you in connection with all the counts, each offense and the evidence applicable thereto should be considered separately as though no other offense was charged. The fact that you may find some or all of the accused guilty or not guilty, of one of the offenses charged should not influence your verdict with respect to any other offense charged."

It is submitted that the Court could not sensibly make reference to Mrs. Davenport in connection with every instruction given which did not relate to conspiracy. Its instructions, read as a whole, fairly and adequately distinguished her position from the other defendants.

219 (1940); *McDonald v. U.S.*, 89 F.2d 128, 137, 8 Cir. 1937, cert. den., 301 U.S. 697; *Wilkerson v. U. S.*, 41 F.2d 654, 656, 7 Cir. 1930, cert. den., 282 U.S. 894; *Sloan v. U.S.*, 31 F.2d 902, 905, 8 Cir. 1929.

V.

**THE COURT PROPERLY ADVISED THE JURY OF THE PLEAS
OF GUILTY BY CO-DEFENDANTS AND SAFEGUARDED
APPELLANT AGAINST IMPROPER INFERENCES
THEREFROM BY PRECAUTIONARY INSTRUCTIONS**

(Answer to Appellant's Assignment of Error V).

This court has recognized that as a practical matter, where certain of the defendants named in the indictment have pleaded guilty, the jury will inevitably learn this fact during the course of the trial. As pointed out by this court in *Nemec v. U. S.*, supra, at p. 661, where it was claimed that one of the co-defendants, Rector, had changed his plea from not guilty to guilty in the presence of certain jurors seated in the courtroom:

"Since it was inevitable that during the trial of the case it would be developed that Rector was named in the indictment and that he had pleaded guilty, we think that appellants' complaint on this point is wholly without merit, particularly in view of the fact that the court adequately cautioned the jury against permitting this circumstance to affect their determination of the guilt or innocence of the other defendants."

As stated in *U. S. v. Dewinsky*, 41 F. Supp. 149, D.C. N.J. 1941, where the trial judge mentioned that eight of the defendants charged in a conspiracy had pleaded guilty to it:

"The mention of these other persons, as will be seen from the language of the charge, was to get them out of the jury's minds and direct the latter's attention to the persons who had stood trial. Several of the defendants who had pleaded guilty had testified. All were identified in court from time to time by various witnesses. The problem for the jury

was, of course, not their guilt, but that of those who stood trial.

“It seems anomalous that that which was inserted for the defendant’s protection should now be made the basis of complaint.”

In *Holmes v. U. S.*, 134 F.2d 125, 8 Cir. 1943, *cert. den.* 319 U.S. 776, two of the defendants had entered pleas of *nolo contendere* in the presence of the jury and the trial judge had explained the effect of these pleas. The court stated, at page 130:

“Here again, though represented by counsel, no objection was made to the procedure and the court was not called upon to make any ruling. Certainly when no objection is interposed it cannot be said to be prejudicial error to permit a co-defendant to enter a plea of *nolo contendere* in the presence of the jury, especially when the court explains the effect of such plea. *Kelling v. United States*, 8 Cir., 121 F.2d 428.”

See also *U. S. v. Hartenfeld*, 113 F.2d 359, 362, 7 Cir. 1940, *cert. den.* 311 U.S. 647; *U. S. v. Joel Rosenberg*, 146 F. Supp. 555, E.D. Pa 1956; *Grumberg v. U. S.*, 145 Fed. 81, 86, 1 Cir. 1906; *U. S. v. Rollnick*, 91 F.2d 911, 917, 2 Cir. 1937; *Hines v. U. S.*, 131 F.2d 971 at 974, 10 Cir. 1942.²⁰

²⁰ Appellant cites *Nigro v. U. S.*, 117 F.2d 624, 8 Cir, and *Walker v. U. S.*, 93 F.2d 383, 8 Cir. Neither case is authority for appellant’s claim of reversible error here. In the *Nigro* case the assignment of error that the jury should not have been told of the co-defendants’ pleas of guilty did not appear to have been the basis for the reversal of the judgment of conviction, and the appellate court’s remarks were in the nature of an admonishment. Moreover, differing from the instant case where a precautionary instruction was given, there is no reference

The conjecture in appellant's argument that the knowledge by the jury of the guilty pleas made appellant's conviction a foregone conclusion is neither logical nor factual. As we have noted, Martin, one of the other defendants, was acquitted by the jury. Moreover, a reading of the record in this case shows the effort of all of the defendants to place responsibility for the crime on the shoulders of Errion while attempting to exculpate themselves. Errion's plea of guilty obviously would be consistent with this defense.

In announcing the guilty pleas the court cautioned the jury:

"The fact that they entered pleas does not necessarily mean that they alone are responsible for the crimes charged in the indictments nor does it necessarily mean that each or any of the other defendants is guilty with them. In fact, it is no evidence of their guilt or innocence or that a crime was committed. (That is, the pleas of Errion and Montgomery are no evidence of the guilt of any of the defendants nor evidence that a crime was committed.) The guilt or innocence of the defendants who are on trial must be determined by you solely by the evidence introduced at this trial." (Tr. 1750)

The record does not indicate that any objection was made to the court's reference to Errion's and Montgomery's pleas of guilty nor was the court requested at the close of the case to give an instruction in lieu of or supplementing that already given. In fact, having

in the report to such precautionary instruction in the *Nigro* case. In *Walker v. U. S.*, the court found no error and merely pointed out that it was "scarcely prejudicial" to receive a plea of guilty in the jury's presence where the defendant who pleaded guilty subsequently took the stand and testified.

awaited the jury's verdict on the claimed defense that Errion was the sole culprit, appellant can scarcely now claim prejudicial error to her because the court brought out in its remarks what the jury was bound to learn, that two of the scoundrels had admitted their crime.

A collateral point appears to be present in appellant's assignment of error, namely, that by the court's failure to advise the specific counts to which the pleas of guilty were entered it gave the impression that pleas of guilty had been entered as to all counts and hence that a conspiracy was proven. Appellant's argument appears to defeat itself, since in fact defendant Montgomery had pleaded guilty to conspiracy, and reference to this fact would, by appellant's logic, have established the crime of conspiracy without regard to Errion's plea. The complications which would have arisen had the court made specific reference to the counts to which the pleas of guilty were entered are manifest and would certainly have given rise to unwarranted speculation by the jury. The court's reference to the fact of the pleas of guilty in a general way, with the precautionary instruction, appears to have been the practical way of handling the situation, clearly following the expression of this court in the *Nemec* case.

CONCLUSION

Appellant had a fair trial lasting nearly twelve trial days. She showed herself an alert and capable witness, a woman active in business, social and civic affairs, though in advanced years. Appellee respectfully submits that seasoned experience and full maturity are not defenses for crime or conclusive of innocence.

Appellant had the motives of recovery of money from Errion and profit from the use of her corporate name and account, under circumstances which discredit her explanation. The record is clear that from her long association with Errion she knew of his reputation for fraud and knew that he was hiding his identity by using The Davenport Corporation as his "front". She was aware when she signed the contract with Mt. Hood that finances for the construction of such a grandiose plant would be a key requirement for its success and that her corporation was to "assist in the financing" and to do this "with due diligence". For an experienced business woman to sign a contract of this kind, inviting the investment of common workers to the venture, while at the same time acknowledging that she was told she would have nothing to do under the contract, was a badge of fraud. Appellant acted under circumstances and in a manner from which the jury could reasonably find and did find she acted as a participant in the conspiracy to execute a fraudulent scheme and to violate the securities laws, involving use of the mails.

The jury showed itself careful, devoted time to its

deliberations, and made distinctions between the defendants. The jury acted after competent instructions. There is ample evidence to support its verdict.

The conviction should be affirmed.

Respectfully submitted,

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